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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term, 1982

No. A-428

WYNETTE E. BENNETT, Administratrix of
the Estate of EDWIN N. BENNETT,

Petitioner,

vs.

ENSTROM HELICOPTER CORPORATION,

Respondent.

PETITION FOR
WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

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The Petitioner, WYNETTE E. BENNETT, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in

this proceeding on June 3, 1982, reported at 679 F2d 630 (1982) reported at 686 F2d 406 (1982) and the opinion on rehearing entered on August 12, 1982.

QUESTION PRESENTED

Whether a federal court of appeals affirming the erroneous application of foreign substantive law in a diversity case has departed from the accepted and usual course of judicial proceedings, calling for the exercise of this Court's power of supervision, where it refuses to follow decisions of the highest courts of the forum state and the foreign country, which were issued subsequent to oral argument in the appellate court, and which together uphold the plaintiff's cause of action.

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinions of the Court of Appeals are reported at 679 F2d 630, and 686 F2d 406, and appear in the Appendix. The opinion rendered by the District Court for the Western District of Michigan was not reported, and appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 3, 1982, and the opinion on rehearing was entered August 12, 1982. The motion for extension of time in which to file this Petition for Certiorari was granted on November 10, 1982, within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254 (1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of the New Zealand Accident Compensation Act 1972 are sections 5(1), 43, 102B, 122, 123(5) and 131. The full text of these sections is set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner Wynette Bennett brought an action in the District Court for the Western District of Michigan against Respondent Enstrom Helicopter Corporation, alleging that respondent's breach of express and implied warranties, negligence, and breach of bailment had caused the death of her husband. Respondent was the owner and manufacturer of a helicopter which had been shipped to New Zealand for the purpose of developing an overseas market for the

product. The jurisdiction of the district court was invoked under 28 USC §1332(2) because of diversity of citizenship, the plaintiff being a citizen of New Zealand and the defendant a citizen of Michigan, incorporated and having its principal place of business in that state.

At the time of the accident, Enstrom was owned by F. Lee Bailey. Mr. Bailey deputized his brother-in-law, Michael Spearman, to represent Enstrom interests in New Zealand, and later sent his top mechanic, Michael Meger, to participate in the demonstration of the helicopter.

Mr. Spearman contacted Edwin Bennett, petitioner's husband, to obtain his services in training New Zealand buyers. On August 21, 1974, Mr. Bennett was demonstrating the helicopter to two potential purchasers. During a brief

stop at a resort area, the helicopter backfired after ignition. On the return flight across Lake Rotorua, the helicopter lost all power, crashed, and rapidly sank in the icy water. The helicopter was not equipped with flotation devices, although both Spearman and Meger were aware that such devices were required by the New Zealand Aviation Code. Mr. Bennett and one of his passengers drowned.

The engine failure which caused the accident was familiar to Meger, because identical failures had caused accidents while the helicopter was being tested in the United States. Curiously, when Spearman reported the Bennett fatality to Ernest Medina and Bailey at the home office, the Enstrom personnel assumed that damages were to be covered by a United States insurance company.

Yet Enstrom moved for dismissal and summary judgment pursuant to FRCP 56, arguing that the New Zealand Accident Compensation Act of 1972 (ACA) barred any proceedings, or recovery of damages other than those provided to the petitioner under the ACA. This argument was supported by the affidavit of Sir John Ross Marshall, concluding that the case could not be brought in any New Zealand court. The motion was denied pending further discovery, and was subsequently renewed. On November 12, 1980, the Honorable Douglas W. Hillman issued a memorandum opinion granting summary judgment on the basis that "plaintiff's action [was] barred by the New Zealand Accident Compensation Act."

The matter was pursued to the Sixth Circuit Court of Appeals. Oral arguments were conducted on March 4, 1982.

The case was decided on June 3, 1982, when Michigan, the forum state, espoused the conflicts rule that the substantive law of the place of the wrong controls. Relying upon Judge Hillman's decision, the Court of Appeals held that, "[t]here is simply no longer, under New Zealand substantive law, a common law tort action for persons covered by the Compensation Act." The court noted that petitioner would prevail "only if there is some reason to bend the Michigan conflicts rule of lex loci delicti."

Such a reason presented itself on June 14, 1982, when the Michigan Supreme Court released Sexton v Ryder Truck Rental, Inc., 413 Mich 406 (1982), which largely overruled the lex loci rule in the context of motor vehicle and aircraft accidents. Petitioner promptly sought, and was granted, rehearing.

Upon reconsideration, the Court of Appeals reaffirmed the district court's judgment for Enstrom because the court decided that a balancing of the respective interests of Michigan and New Zealand demonstrated little reason to apply Michigan law to the case.

The 90-day period for seeking Supreme Court review was to expire on November 10, 1982. On November 4, 1982 petitioner's counsel received a telephone call seeking information about the instant case from a New Zealand attorney who was writing her thesis for an L.L.M. on the topic of the New Zealand Accident Compensation Act (ACA). In the course of the conversation, she indicated that the highest court in New Zealand had recently issued two opinions regarding the continued availability of a claim for exemplary damages in New Zealand courts.

As a result of Donselaar v Donselaar and Taylor v Beere, decided on March 19, 1982, the academic and judicial controversy which had raged in New Zealand since the 1972 passage of the ACA was put to rest. A claim for exemplary damages is now clearly recognized as one that is available despite the ACA.

With this information, petitioner immediately submitted a motion to extend the time in which to file for rehearing, as well as a second petition for rehearing to the Sixth Circuit Court of Appeals. Respondent opposed the rehearing petition and the court of appeals denied the requested waiver of FRAP 40(a), thus foreclosing review of the underlying petition. Concurrently, petitioner requested this court to extend the time for filing her petition for certiorari, to permit counsel to receive and review

the operative New Zealand opinions.[1]

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS REFUSED TO FOLLOW THE DECISIONS OF THE MICHIGAN SUPREME COURT AND THE NEW ZEALAND COURT OF APPEALS, WHICH WERE ISSUED SUBSEQUENT TO ORAL ARGUMENT IN THE SIXTH CIRCUIT, AND TOGETHER PERMIT PLAINTIFF TO MAINTAIN HER CAUSE OF ACTION.

A federal court sitting in diversity applies the conflicts law of the forum state. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 US 487; 61 SCt 1020, 85 LEd 1477 (1941). In reliance upon what it conceived to be the principles established by Michigan law, the Sixth Circuit held that lex loci delicti would apply. The court of

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[1] Counsel was unable to obtain copies of either opinion until early in December. However, a summary of the Donselaar case was located and provided to both the Sixth Circuit and to this Honorable Court.

appeals accepted the opinion of the district court that the lex loci operated to bar the plaintiff's claim, on the basis that the ACA was an exclusive remedy provision.

Subsequent to oral argument in this case, the Michigan Supreme Court substantially abandoned the lex loci rule. The Sixth Circuit's order on rehearing acknowledges the change in the conflicts doctrine[2] but nevertheless declined to apply Michigan substantive law.

Petitioner had argued at both the

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2 Justice Levin, who signed both "majority" opinions in Sexton, noted that, "there appears to be little reason to have one choice-of-law rule for lawsuits where the defendant is subject to the jurisdiction of Michigan because he, she or it resides or does business in this state and another rule for lawsuits where the defendant is subject to Michigan jurisdiction because of some other relationship with this state. I

district and circuit courts that the lex fori applied. Even if it did not, petitioner maintained that the lex loci would not bar her claim.

Respondent introduced nothing in the trial court proving that the ACA was plaintiff's exclusive remedy. In fact, respondent's only evidence on this point was provided by a New Zealand affiant who concluded that the ACA was silent with regard to maintenance of actions

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2 (continued) therefore agree with Justice Kavanagh that we should go the distance and declare that Michigan law will apply in all personal injury and property damage actions without regard to whether the plaintiffs and defendants are all Michigan persons unless there is compelling reason for applying the law of some other jurisdiction, and that merely because the injury arose out of an occurrence in another state is not such a reason." (Footnote omitted, emphasis added). 413 Mich at 442.

outside New Zealand.[3] The great weight of authority holds that the party with the affirmative burden of proof on an issue of foreign law loses if he fails to prove that law. Cuba Railway Company v Crosby, 222 US 473, 32 SCt 132, 56 LEd 274 (1912). Respondent failed to carry this burden.

The extent of the failure is apparent on a cursory examination of the literature and judicial opinions which have examined this aspect of the ACA. The instant case proceeded on a misconception that the ACA is an exclusive remedy in a case involving

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[3] The affiant conceded that the ACA provided a means for the Compensation Board's indemnification from funds obtained through proceedings in a foreign country. A 1978 amendment to the ACA clarified § 131(1) by providing that an overseas claim was available whether the injury occurred within or outside New Zealand.

wrongful death, which it is not. New Zealand substantive law provides two remedies for recovery of damages in case of personal injury or death due to an accident. One is found in the ACA, but the common-law remedy for wrongful death actions based on negligence[4] was left intact.

Although the ACA abolishes the common-law right to bring proceedings for compensatory damages arising out of either tort or contract, it applies only

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[4] The common law regarding wrongful death, actio personalis moritur cum persona (a personal action dies with the litigant), was displaced by the 1936 Law Reform Act. The 1952 Deaths by Accident Compensation Act provides for a right of action when death is caused by negligence, and specifies who may bring an action and what amount of damages may be awarded. Promulgation of the ACA resulted in consequential amendments to various Acts of Parliament but did not repeal the extant wrongful death legislation.

where proceedings are brought "in New Zealand". Where death results from the injury which occurred in New Zealand, and there is coverage under the Act:

(1) a claim for both compensatory and exemplary damages can be brought outside New Zealand pursuant to §5(1) and §131(1) if allowed under the law of any other country (except New Zealand), and

(2) a claim for exemplary damages can be brought in New Zealand since the ACA does not bar such an action even where compensation has already been awarded under the Act. Donselaar v Donselaar.

The ACA left various areas of "residual liability", including the common-law tort of negligence. Applying New Zealand law in a Michigan court, an action may be brought under the 1936 Law

Reform Act and the 1952 Deaths by Accident Compensation Act, and for exemplary damages pursuant to the Donselaar and Taylor cases. This is the appropriate "substantive law" of New Zealand that should have been applied in considering petitioner's claim.

In refusing to consider the New Zealand cases which clearly uphold petitioner's cause of action in New Zealand, the court of appeals has, in effect, ignored its own interpretation of the Michigan Supreme Court's Sexton opinion. If the Sixth Circuit believes that a Michigan court would continue to apply the lex loci under these circumstances, it has an obligation to review the lex loci before affirming the district court's erroneous construction of the foreign law. In disregarding this obligation, the court of appeals

sanctions a gross miscarriage of justice, depriving this petitioner of the recovery she could have obtained if suit had been brought in New Zealand in the first instance.

Petitioner sought renewed access to the court of appeals to afford it the opportunity to correct its opinions in light of the definitive New Zealand cases. The Sixth Circuit declined further consideration. Denied the chance to apprise the court of appeals of its error, petitioner has no option but to seek Supreme Court review. Disregard of the Michigan and New Zealand case law, penalizing the petitioner for bringing her action in a United States court, is sufficient to invoke the court's general supervisory power over the federal judiciary.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinions of the Sixth Circuit.

Respectfully submitted,

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